

## **REMARKS/ARGUMENTS**

Reconsideration of the application is respectfully requested.

### **REJECTION UNDER 35 USC 112**

Claims 1-5, 15 and 17-22 stand rejected under 35 USC 112, first paragraph as being non-enabling for the reasons given in the Office actions mailed 4/4/03, 11/26/03, and 8/13/04.

Applicants will first review each of these Office actions to clarify what applicants believe are the only 35 USC 112 issues remaining in this case.

#### **Office Action of 4/4/03**

In the office action of 4/4/03, claim 1 was rejected because the claim recited apparatus “for” containing edible material that is sterilized and contains an inert gas under pressure.

In response to this rejection, in the amendment dated 7/7/03, claim 1 was amended as follows:

“...a thin wall sealed container ~~for~~ containing..”

This rejection has not been repeated.

In the office action of 4/4/03, claim 1 was also rejected because the claim did not adequately define the structural elements and their functional relationship to each other in that the raised portion was not adequately defined.

In response to this rejection, in the amendment dated 7/7/03, claim 1 was amended as follows:

“...the container having an upper chime at a height above the top end and the raised portion having an upper surface which is at least the same height as the upper chime.”

### **Office Action of 11/23/03**

In the second office action dated 11/23/03, claims 1-5 and 15-22 were again rejected under 35 USC 12, first paragraph as being non-enabling "...in regard to the structural elements, i.e. the concave slope and the raised portion and their dimensional and functional relationship to each other. That is, it is not clear what the raised portion is raised relative to."

Further, the Examiner also pointed out that the purpose of the raised portion, as disclosed, is to provide greater headspace for absorbing pressure increases and that this would be dependent on the geometry and any changes of the center concave portion. and that "... some functional, dimensional relationship between the raised portion and the concave portion then the raised portion was require to be set forth in the claims.

The Examiner also noted some inconsistencies in the claim regarding the location of the raised end., the concavity, the top end and the chime.

In an amendment dated 5/25/04 in response to the office action of 11/23/03, claim 1 was amended as follows:

Apparatus for containing sterilized edible material, which comprises:

a thin wall sealed container containing edible material sterilized in a sterilization process and an inert gas under pressure, the side wall of the container being maintained rigid by the pressure of the inert gas but being easily deformable in the absence of such pressure, the container having a top end and a bottom end with ~~at least one~~ the top end extending downwardly from an upper chime at the side wall and then extending inwardly of the side wall, the top end having a raised portion being formed inwardly of the side wall,

~~the container having an upper chime at a height above the top end and the~~  
raised portion having an upper surface which is ~~at least~~ substantially the same height as the upper chime or higher, the top defining a concavity adjacent to and inward of the raised portion, the concavity having a concave slope relative to the inside of the container, ~~the at least one end~~ and being made of a material and

having a thickness and shape such that said concavity ~~at least one end of said sealed container~~ will retain a substantially concave slope before, during and after said sterilization process but will become convex only if there is any additional gas pressure generated due to bacterial action in the pressurized, sealed container.

#### **Office Action of 8/13/04**

In a third Office Action dated 8/13/04, claim 1 was again rejected under 35 USC 112, first paragraph "...as being non-enabling for the reasons given in the Office actions mailed 4/4/03 and 11/26/03. That is, the claim does not recite the dimensional and functional relationships of the elements necessary to define the invention as disclosed in the specification."

The Examiner further noted that claim I did not clarify what the phrase "... the top end is extending "inwardly" means... " and that there was still some uncertainty with respect to the phrase "raised portion."

The Examiner also questioned whether the intent in the third paragraph was "... to recite-top end-instead of just one point on the top end, or is arranged circumferentially around the top end."

In a response dated 2/14/05 to the office action of 8/13/04, no amendment of the claims were made; instead, applicants contended that the claims as previously amended fully complied with 35 USC 112, first paragraph.

#### **Current Office Action**

In the current Office action dated 12/9/05, the Examiner again rejects claims 1-5, 15 and 17-22 under 35 USC 112, first paragraph as being non-enabling for the reasons given in the Office actions mailed 4/4/03, 11/26/03, and 8/13/04.

It is believed that the only issue remaining from the Office actions mailed 4/4/03, 11/26/03, and 8/13/04 is that the claims do not recite the dimensional and functional relationships of the elements necessary to define the invention as disclosed in the specification.

Applicant again respectfully submits that the claims fully comply with 35 USC 112, first paragraph.

As set forth in MPEP 2164:

The enablement requirement refers to the requirement of 35 U.S.C. 112, first paragraph that the specification describe how to make and how to use the invention. The invention that one skilled in the art must be enabled to make and use **is that defined by the claim(s)** of the particular application or patent.  
(emphasis added)

Thus, any analysis of whether a particular claim is supported by the disclosure in an application requires a determination of whether that disclosure, contains sufficient information regarding the **subject matter of the claims** as to enable one skilled in the pertinent art to make and use the claimed invention.

Further, as set forth in MPEP 2164.04, in order to make a rejection, the examiner has the initial burden to establish a reasonable basis to question the enablement provided for the **claimed** invention. This the examiner has not done. Instead, the examiner contends that the "... claim does not recite the dimensional and functional relationships of the elements necessary to define the invention as disclosed in the specification." The examiner has, therefore, turned the proper test on its head.

The examiner never contends that one skilled in the art to make and use the invention **claimed**. In view of the foregoing, Applicants again respectfully submit that the specification fully complies with 35 USC 112, first paragraph.

Notwithstanding the foregoing, Applicants have again amended Claim 1 in the interest of satisfying the Examiner. It is believed that this amendment merely makes

explicit what the claim had previously recited implicitly and, therefore, the amendment does not constitute a change made for patentability purposes.

### **Rejections Under 35 U.S.C. 103(a)**

Claims 1,2,4,15, and 17-22 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Diamond et al ('237) in view of Knize ('388), further in view of Creegan ('765) and Shepard ('080), further in view of Wilkinson et al ('933), Malmquist ('239), Jones ('867), Pettit et al ('140) and Rayzal ('279) for the reasons given in the Office actions mailed 11/26/03 and 8/13/04.

Claims 3 and 5 are rejected under 35 U.S.C. 103(a) as being unpatentable over the references as applied to claim 1 above, and further in view of Saunders ('774) for the reasons given in the Office action mailed 4/4/03.

Applicants respectfully traverse these rejections.

In Diamond et al. the concavity of the top end extends downwardly and inwardly **from an upper chime at the side wall**. In contrast, the container specified in claim 1 has a concavity, which is adjacent to and inward of the raised portion which, in turn, is defined inwardly and **spaced from the side walls or chime portion of the container**. Thus, the concavity does not extend from the chime as in Diamond et al. But instead extends from the inwardly formed raised portions.

In view of the foregoing, it is respectfully submitted that claim 1 is clearly patentable over Diamond et al.

Knize, Creegan and Shepard teach nothing about a concavity in the top or any other location and, therefore it is clear that claim 1 is patentable over the combination of Diamond et al., Knize, Creegan and Shepard.

Claims 2, 15 and 17-22 are dependent either directly or indirectly from claim 1 and are, therefore, patentable for the same reasons, as well as because of the combination of the features set forth in these claims with the features set forth in the claims from which they depend

Claims 3 and 5 are rejected under 35 U.S.C. 103(a) as being unpatentable over the references as applied to claim 1 above, and further in view of Saunders ('774) for the

reasons given in the Office action mailed 4/4/03. Applicants respectfully traverse this rejection.

Claims 3 and 5 are dependent indirectly from claim 1. Since Saunders does not cure any of the deficiencies of claim 1 noted above, it is respectfully submitted that claims 3 and 5 are therefore patentable over the combination of Diamond et al. and Saunders for the same reasons advanced above in connection with claim 1 as well as because of the combination of the features set forth in these claims with the features set forth in claim 1.

In view of the foregoing, this application is now believed to be allowable, which action is respectfully requested.

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I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on April 10, 2006

Martin Pfeffer

Name of Person Mailing Correspondence

Signature

April 10, 2006

Date of Signature

Respectfully submitted,



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